

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.749 of 2023**

Arising Out of PS. Case No.-82 Year-2014 Thana- KAHALGAON District- Bhagalpur

Paglu Tanti S/O Late Vinku Tanti R/O (Village), Bela Fulwariya, P.S-
Sanokhar, District- Bhagalpur

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Baijnath Sah, Adv.

For the Respondent/s : Mr. A.M.P. Mehta, APP

**CORAM: HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA
ORAL JUDGMENT**

Date : 14-11-2024

1. Heard the parties.

2. The present appeal preferred by

appellant/convict, namely, Paglu Tanti against judgment of conviction dated 04.01.2023 and order of sentence dated 06.01.2023 rendered by learned Exclusive Special Judge POCSO cum 7th Additional District and Sessions Judge, Bhagalpur in POCSO case No. 147 of 2019 in connection with (Kahalgaon) Sanokhar P.S. Case No. 82 of 2014, whereby and where under appellant/convict has been convicted for the offence punishable under Section 4 of POCSO Act and has directed the appellant to undergo R.I. for 7 years and fine of Rs. 10,000/- and in default of payment of



fine he is directed to further undergo SI for three months.

3. Case of prosecution in brief as it appears from *fardbeyan* of victim/Informant (PW-3), who is a married lady but after deserting her husband was residing with her parents. On 28-09-2014, she had left her house at around 1:00 AM night and gone to the house of her neighbor, namely, Boka Mandal, thereafter again she had gone to the house of Sadan Mandal where she stayed whole day and in the evening of 29-09-2014 she had gone to the house of her neighbor, namely, Paglu Tanti (appellant) and on the advice of appellant's wife she was sleeping on the "*chouki*" available in the room of the appellant. Further alleged that on 30.09.2014 at about 1:00 AM appellant entered into the room where victim was sleeping and committed rape upon her and assured that he would arrange a suitable match for her but she started to cry, upon so, appellant offered her Rs. 500/- and advised her not to disclose anyone about the occurrence but anyhow on 30.09.2014, somewhere between 9:00-10:00, PM victim returned to her parental home and disclosed about the incidence to her mother and on the next date a *panchayati*



was called for but appellant did not come in the *panchayat*.
Consequent upon occurrence was reported to police.

4. On the basis of aforesaid written information, (Kahalgaon) Sanokhar P.S. Case No. 82 of 2014 was lodged under section 376 of I.P.C., against the appellant.

5. To substantiate its case, the prosecution has examined altogether four witnesses. They are:-

Prosecution Witnesses No(s).	Names
P.W. 1	Mala Devi (co-villager)
P.W. 2	Usha Devi (co-villager)
P.W. 3	Informant (victim)
P.W. 4	Ranju Devi (victim’s bhabhi)
P.W. 5	Dr. Shilpi Rani (Doctor)
P.W. 6	America Paswan (ASI)

6. Apart from the oral evidence, the prosecution has also relied upon following documents/exhibits in order to prove the charges:-

Exhibit No(s).	List of documents
Exhibit-p/1	Medical Report
Exhibit-p/2	Formal FIR
Exhibit-p/3	Charge-sheet

7. On the basis of evidences, as surfaced during



the trial, the appellant/convict was examined under Section 313 of the Cr.P.C., where he denied all incriminative evidences as surfaced against him during trial and claimed his complete innocence and false implication.

8. Neither any defence witness nor any document was exhibited in support of defence by appellants/convicts.

9. Upon the basis of evidences as surfaced during the trial and also by taking note of the argument as advanced by the learned counsel appearing on behalf of the parties, the learned trial court convicted appellant/convict and passed order of sentence, as stated hereinabove.

10. Being aggrieved with aforesaid judgment of conviction and order of sentence, the appellant/convict preferred the present appeal.

11. Hence the present appeal.

Argument on behalf of the appellant/convict:

12. It is submitted by learned counsel arguing on behalf of the appellant/convict, that victim was a married lady but disclosed her age as 16 years in FIR authored herself without having any basis. It is pointed out that she was not



proved “child” within the meaning of Section 2(1)(d) of the POCSO Act as she could not proved below 18 years in terms of Section 94(2) of Juvenile Justice (Care and Protection of Children) Act, 2015 which also stands approved by Hon’ble Apex Court through its judgment in the matter of ***Jarnail Singh vs. State of Haryana*** as reported through **2013 (7) SCC 263** and also ***P. Yuvaprakash vs. State Rep. by Inspector of Police*** reported through **2023 SCC OnLine SC 846**.

13. It is further submitted by the learned counsel for the appellant that the conviction in the present case secured on the basis of sole testimony of victim/PW-3 but from the materials available on record i.e., her *fardebayan*, statement as recorded under Section 164 of the Cr.P.C. and also her deposition made before court during the trial, she cannot be said to qualify the test of “sterling witness” and therefore the conviction as recorded by learned trial court is fit to be set aside/quashed.

14. In support of his submissions learned counsel relied upon the legal report of Hon’ble Supreme Court as



available through ***Rai Sandeep vs. State (NCT of Delhi)***
reported in ***(2012) 8 SCC 21.***

Argument on behalf of State:

15. Learned APP appearing on behalf of State categorically submitted that victim/informant/PW-3 categorically testified during the trial that appellant committed rape upon her but he could not disputed the fact that the victim proved “child” within the meaning of Section 2(1)(d) of the POCSO Act as per the legal norms settled through Section 94(2) of Juvenile Justice (Care and Protection of Children) Act, 2015.

16. I have perused the trial court records carefully and gone through the evidences available on record and also considered the rival submissions as canvassed by learned counsel appearing on behalf of the parties.

17. As to re-appreciate the evidences, while disposing the present appeal, it would be apposite to discuss the evidences available on record, which are as under:-

18. The most important witness of present occurrence is, **PW-3**, who is victim/informant herself. It



appears from her deposition that she is a married lady and as her husband was not of her choice, she left him and returned to her paternal village where after roaming for few days/hours she joined the family of the appellant who assured her to solemnize her second marriage of her choice and ask her to stay in his house. Coming to the statement of victim as recorded under Section 164 of the Cr.P.C. it appears that she was offered food by appellant family in the night which appears to be adulterated. In night appellant came to her room and made an attempt to commit rape upon her whereafter she fled away but the door was closed from the outside. Whereafter appellant thrown her on cot where his wife was sleeping and thereafter committed wrong work (rape) on her. It appears from her statement that the wife of the appellant also helped him while committing rape upon her. She was offered Rs. 500/- not to disclose incident to others whereafter at about 1:30 A.M. she was ousted from the house.

18.1. Taking note of FIR which was authored by victim/PW-3 herself it appears that rape was committed in the



same room where she was sleeping and no allegation was raised against the wife of appellant. There is also no allegation regarding giving of adulterated food. It appears from the *fardbeyan* that she was allowed to go between 09-10 P.M. on 30-09-2014 from the house of the appellant.

19. Coming to the testimony of victim as she deposed before the learned trial court, it appears that rape was committed upon her while she was sleeping in room, somewhere in midnight by appellant. She remained there for whole day i.e., on 30.09.2014, and thereafter she was allowed to go from the house of the appellant. It appears from her cross-examination that her statement was recorded before the police after two days of the occurrence. She denied any previous enmities and land dispute with the appellant whereas she confirmed the *panchayati*. It is admitted position of law that the FIR/*fardbeyan* and statement as recorded under section 164 of the Cr.P.C. are not the substantial piece of evidence but their corroborative value cannot be ignored. It is essential to test victim whether her testimony inspired confidence and also to check her trust worthiness *qua* crime in



question.

20. In this context, it would be apposite to reproduce para 22 of ***Rai Sandeep case (supra)*** which reads as follows:-

"22. In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not



be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a “sterling witness” whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.”

21. PW-1 is Mala Devi and **PW-2** is Usha Devi, where PW-1 categorically deposed through her examination-in-chief that victim was available at her house and no alarm was raised. She identified appellant being co-villager. Similarly, PW-2 categorically deposed that she is not aware about the occurrence and she only came to know that victim went somewhere else. Both these witnesses were not declared hostile by the prosecution during the trial. Considering their depositions the occurrence further appears doubtful.

22. PW-4 is Ranju Devi, who is the sister-in-law



of victim/PW-3. It appears from her examination-in-chief that she came to know from the victim herself that appellant committed rape upon her. She also denied previous litigation or enmities between the parties.

23. PW-5 is Dr. Shilpi Rani, who conducted medical examination upon the victim on 03-10-2014 at Sadar Hospital, Bhagalpur finding of which are under :-

“3. No injury physical or chemical seen on any part of the body including private part.

A. Send two sealed vaginal swab to the dept of pathology JLNMC, BGP for detection of spermatozoa and also request for Urine test for pregnancy.

B. Request for radiological determination of age sent to department of radiology JLNMC, BGP, (X-ray B/L wrist joint A/P and lateral, x-ray pelvis, x-ray B/L elbow joint apl Lateral, x-ray (B/L and ankle joint A/P and lateral)- and also for USG- lower abdomen (and axnxa) to determination pregnancy if any.

D. EL N0. E-2570 at 2 P.M. on 03-10-2014

4- M.I - A Black mole on right side of chin. A Blackish mole of left cheek left side of nose.

5. On 13-10-2014 according to pathological report dept of pathology JLNMC, BGP serial no. 247 memo no. 393 dated 04-10-2014 spermatozoa not found and urine test for pregnancy is negative.

6. According to radiological report dept of radiology JLNMC, BGP X-ray no.261 M.R No. Free dated 04-10-2014 her age is below 18 years. According to USG report dept of radiology



*JLNMCH, BGP Ultrasound no. 17938 M.R no.
free dated 04-10-2014 Uterus - Normal size,
empty no gestation sac.”*

23.1. It also appears from medical examination reports that there was no evidence of recent sexual intercourse however she was found below 18 years.

24. Now the another important question which arises is whether the victim was proved “child” within the meaning of Section 2(1)(d) of the POCSO Act during the trial or not.

25. In this context it appears that save and except radiological examination as victim found below 18 years and also as per the *fardbeyan* where victim herself stated that she is 16 years old at the time of occurrence nothing appears in support of her age. It is well settled law that the age of victim to be decided as per legal provisions available under Section 94(2) of Juvenile Justice (Care and Protection of Children) Act, 2015.

26. It would be apposite to reproduce para nos. 22 and 23 of the ***Jarnail Singh’s case (supra)*** and also para 14, 15, 16 and 17 of ***P. Yuvaprakash case (supra)***



which reads as under:-

"22. On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as the 2007 Rules). The aforesaid 2007 Rules have been framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000. Rule 12 referred to hereinabove reads as under :

"12. Procedure to be followed in determination of age.- (1) *In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.*

(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or



(iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i),(ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of Section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed off cases, where the status of juvenility has not been determined in



accordance with the provisions contained in sub-rule(3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.”

"23. *Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW-PW6. The manner of determining age conclusively, has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a*



corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the concerned child, on the basis of medical opinion.”

14. *Section 94(2)(iii) of the JJ Act clearly indicates that the date of birth certificate from the school or matriculation or equivalent certificate by the concerned examination board has to be firstly preferred in the absence of which the birth certificate issued by the Corporation or Municipal Authority or Panchayat and it is only thereafter in the absence of these such documents the age is to be determined through “an ossification test” or “any other latest medical age determination test” conducted on the orders of the concerned authority, i.e. Committee or Board or Court. In the present case, concededly, only a transfer certificate and not the date of birth certificate or matriculation or equivalent certificate was considered. Ex. C1, i.e., the school transfer certificate showed the date of birth of the victim as 11.07.1997. Significantly, the transfer certificate was produced not by the prosecution but instead by the court summoned witness, i.e., CW-1. The burden is always upon the prosecution to establish what it alleges; therefore, the prosecution could not have been fallen back upon a document which it had never relied upon. Furthermore, DW-3, the concerned Revenue Official (Deputy Tahsildar) had stated on oath that the records for the year 1997 in respect to the births and deaths were missing. Since it did not answer to the description of any class of documents mentioned in Section 94(2)(i) as it was a mere transfer certificate, Ex C-1 could*



not have been relied upon to hold that M was below 18 years at the time of commission of the offence.

15. *In a recent decision, in Rishipal Singh Solanki v. State of Uttar Pradesh,*³ *this court outlined the procedure to be followed in cases where age determination is required. The court was dealing with Rule 12 of the erstwhile Juvenile Justice Rules (which is in pari materia) with Section 94 of the JJ Act, and held as follows:*

“20. Rule 12 of the JJ Rules, 2007 deals with the procedure to be followed in determination of age. The juvenility of a person in conflict with law had to be decided prima facie on the basis of physical appearance, or documents, if available. But an inquiry into the determination of age by the Court or the JJ Board was by seeking evidence by obtaining: (i) the matriculation or equivalent certificates, if available and in the absence whereof; (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof; (iii) the birth certificate given by a corporation or a municipal authority or a panchayat. Only in the absence of either (i), (ii) and (iii) above, the medical opinion could be sought from a duly constituted Medical Board to declare the age of the juvenile or child. It was also provided that while determination was being made, benefit could be given to the child or juvenile by considering the age on lower side within the margin of one year.”

16. *Speaking about provisions of the Juvenile Justice Act, especially the various options in Section 94(2) of the JJ Act, this court held in Sanjeev Kumar Gupta v. The State of Uttar Pradesh*⁴ *that:*

“Clause (i) of Section 94(2) places the date of birth certificate from the school and the matriculation or equivalent certificate from the concerned examination board in the same



category (namely (i) above). In the absence thereof category (ii) provides for obtaining the birth certificate of the corporation, municipal authority or panchayat. It is only in the absence of (i) and (ii) that age determination by means of medical analysis is provided. Section 94(2)(a)(i) indicates a significant change over the provisions which were contained in Rule 12(3)(a) of the Rules of 2007 made under the Act of 2000. Under Rule 12(3)(a)(i) the matriculation or equivalent certificate was given precedence and it was only in the event of the certificate not being available that the date of birth certificate from the school first attended, could be obtained. In Section 94(2)(i) both the date of birth certificate from the school as well as the matriculation or equivalent certificate are placed in the same category.

17. *In Abuzar Hossain @ Gulam Hossain v. State of West Bengal,⁵ this court, through a three-judge bench, held that the burden of proving that someone is a juvenile (or below the prescribed age) is upon the person claiming it. Further, in that decision, the court indicated the hierarchy of documents that would be accepted in order of preference.”*

27. Admittedly, there is no documents as issued from the first the attending school or from the local *panchayat* produced during the trial in support of the age of the victim, in view of under Section 94(2) of Juvenile Justice (Care and Protection of Children) Act, 2015. As far as radiological examinations is concerned there is always chance of error and, therefore, after giving a marginal benefit of ± 2 years,



the victim appears major on the date of occurrence, moreover, she was admittedly a married lady on the date of occurrence.

28. In aforesaid context it would apposite to reproduce legal report of Hon'ble Supreme Court as available through ***Rajak Mohammad vs. State of Himachal Pradesh*** reported in ***(2018) 9 SCC 248***, which is as under:-

“9. While it is correct that the age determined on the basis of a radiological examination may not be an accurate determination and sufficient margin either way has to be allowed, yet the totality of the facts stated above read with the report of the radiological examination leaves room for ample doubt with regard to the correct age of the prosecutrix. The benefit of the aforesaid doubt, naturally, must go in favour of the accused.

10. We will, therefore, have to hold that in the present case the prosecution has not succeeded in proving that the prosecutrix was a minor on the date of the alleged occurrence. If that is so, based on the evidence on record, already referred to, we will further have to hold that the possibility of the prosecutrix being a consenting party cannot be altogether ruled out.”

29. In view of aforesaid discussion it can be safely said that victim was not proved “child” within the meaning of Section 2(1)(d) of the POCSO Act during the trial.



30. Hence, in view of aforesaid discussions the presumption as available under Sections 29 and 30 of the POCSO Act not appears applicable to present fact of this case.

31. Considering aforesaid discussions it appears that prosecution failed to answer several questions during the trial, which creates a serious doubt *qua* crime in question, benefit of which must be extended to the appellant.

32. Accordingly, appellant deserves to be given benefit of doubt.

33. Accordingly, appeal stands allowed.

34. The impugned judgment of conviction dated 04.01.2023 and order of sentence dated 06.01.2023 rendered by learned Exclusive Special Judge POCSO cum 7th Additional District and Sessions Judge, Bhagalpur in POCSO case No. 147 of 2019 in connection with (Kahalgaon) Sanokhar P.S. Case No. 82 of 2014 is hereby set aside/quashed.

35. Appellant namely, Paglu Tanti is in custody in connection with this case, he is directed to be released forthwith, if not required in any other case. Fine, if



any paid, by appellant, be returned to appellant immediately.

36. Office is directed to send back the trial court records and proceedings along with a copy of this judgment to the trial court, forthwith.

(Chandra Shekhar Jha, J)

Sudha/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	21.11.2024
Transmission Date	21.11.2024

